

LEX/BDAD/0037/2002

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**IN THE SUPREME COURT OF BANGLADESH
(APPELLATE DIVISION)**

Civil Petition for Leave to Appeal Nos. 504, 510, 516, 617 & 636 of 2002

Decided On: 02.07.2002

Ekushey Television Ltd and others **Vs.** Dr Chowdhury Mahmood Hasan & others

Hon'ble Judges/Coram:

Mainur Reza Chowdhury, C.J., Md. Ruhul Amin, K.M. Hasan, Abu Sayeed Ahammed and Kazi A.T. Monowaruddin, JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: Rafique-ul Huq, Senior Advocate, M Moniruzzaman Khan, Advocate with him instructed by Sharif Uddin Chaklader, Advocate-on-Record, Dr Kamal Hossain, Senior Advocate, instructed by Md Nowab Ali, Advocate-on-Record, Abdur Razzak, Senior Advocate, instructed by Md Aftab Hossain, Advocate-on-Record, Syed Ishtiaq Ahmed, Senior Advocate, instructed by Sharif Uddin Chaklader, Advocate-on-Record, A.F. Hassan Ariff, Attorney-General, Fida M Kamal, Additional Attorney-General and Adilur Rahman Khan, Deputy Attorney-General with him instructed by Md Ataur Rahman Khan, Advocate-on-Record

For Respondents/Defendant: Abdur Razzak, Senior Advocate, instructed by Md Aftab Hossain, Advocate-on-Record - For Respondent No. 1, A.F. Hassan Ariff, Attorney-General, Fida M Kamal, Additional Attorney-General and Adilur Rahman Khan, Deputy Attorney-General with him instructed by Md Ataur Rahman Khan, Advocate-on-Record - For Respondent Nos. 4-8, 4-7, 1-5, 4-8

JUDGMENT

K.M. Hasan, J.

1. The petitioners in the above petitions for leave seek leave to appeal against the judgment and order dated 27-3-2002 passed by a Division Bench of the High Court Division in Writ Petition No. 5050 of 2001 making the Rule absolute. Civil Petition for Leave to Appeal No. 504 of 2002 is by Ekushey Television Limited and its Managing Director, Mr Farhad Mahmud. Civil Petition for Leave to Appeal No. 510 of 2002 is by Foreign Companies as intervener petitioners. Civil Petition for Leave to Appeal No. 516 of 2002 is by the three writ petitioners. Civil Petition for Leave to Appeal No. 617 of 2002 is by Mr AS Mahmud, Chairman and CEO Ekushey Television Limited. Civil Petition for Leave to Appeal No. 636 of 2002 is by the Director General, Bangladesh Television. All these petitions are disposed of by this judgment as the facts and law points involved are similar.

2. Circumstances leading up to the presentation of the aforementioned leave petitions, which have been heard together, may be briefly stated:

3. A Rule Nisi was issued in Writ Petition No. 5050 of 2001 by the High Court Division calling upon the respondents to show cause as to why the licensing agreement dated 9-3-1999, signed by and between the Ministry of Information, the respondent No. 1 and

Mr AS Mahmud, respondent No. 7, Annexure-F of the writ petition, and the subsequent approval to transfer the said licence to the ETV Ltd, Annexure-H of the writ petition, should not be declared to have been entered into and granted unlawfully and without lawful authority and to be of no legal effect.

4. Writ petitioner Nos. 1 and 3 are professors of Dhaka University and the Writ petitioner No. 2 is the President of Bangladesh Federal Union of Journalists. The petitioners feel that the matter raised in the writ petition involves breaches of constitutional obligations and statutory duties by and on behalf of the respondent Nos. 1, 2 and 3, in dealing with public property in clear violation of legal mandates and public policies. The petitioners claim that as conscious citizens of this country, they are duty bound to invoke the extra-ordinary jurisdiction of this Court, under the Constitution, to compel the respondent Nos. 1, 2 and 3 of the writ petition, to perform their public duty under the Constitution and the laws of Bangladesh.

5. In 1998, Ministry of Information invited tenders, by publishing a notice dated 6-5-1998, inviting proposals from local and foreign firms individually or under joint venture to install and operate a television channel under private ownership. Seventeen enterprises participated in the tender which were opened on 25-6-1998 by the Technical Committee of which Mr Anisur Rahman, Chief Engineer (acting) BTV was the convener. The committee was required to evaluate the tenders by taking into consideration the following factors:

- a. Balanced programme in socio-economic context;
- b. The concept and objective of transmitting the programme nationally and internationally;
- c. Technical proposal for establishment of TV network;
- d. Investment proposal;
- e. Seriousness in establishing a TV network.

6. Accordingly, the proposals of the participants in the tender were evaluated and out of seventeen participants, the offer of Minard (Bangladesh) Ltd. was declared commercially unsuccessful. The rest were divided into three categories.

7. The first category included three companies who were found to be satisfactory. Second category included three participants whose tender might be considered as a second preference. The technical committee found the tender of the other ten companies unacceptable. In the third category Ekushey Television was placed at serial No. 5. The evaluation, Annexure-A1 of the writ petition, prepared by the technical committee was sent to the Ministry of Information by a forwarding letter dated 9-7-1998 written by the convener of the committee Annexure-A.

8. The writ petitioners alleged that after submission of the evaluation report, the technical committee came under heavy pressure from an interested group. As a result of which, the technical committee changed the evaluation report and Ekushey Television which was in the rejected list in the earlier and original evaluation report, was placed at the top of the list of the participants found satisfactory. The writ petitioners alleged that this evaluation report, which was also purported to be made and signed by the technical committee members on the same date i.e. 9-7-1998, was totally malafide, unauthorised and unacceptable.

9. The writ petitioners alleged that by a letter dated 16 February, 1999, to the Ministry of Information, Annexure-C of the writ petition, the Ministry of Finance set out a number of conditions for granting licence to Ekushey Television. One of the conditions was that if the private channel transmitted its programme simultaneously with the BTV the private channel would pay Taka 1200 per hour and when no programme was transmitted by BTV the hourly charge would be Taka 1,800 (Annexure-C of the writ petition). According to the petitioner, the hourly charge was far below what was charged by private channels like ATN, Channel-I, who sold their air time at a rate of Taka 40 to 50 thousand per hour.

10. The writ petitioners alleged that upon receiving representation dated 24 February, 1999 from Mr AS Mahmud, Chairman ETV, (Annexure-D), the Ministry of Finance by a back-dated memo dated 16-2-1999 (Annexure-E) deleted paragraph-'Cha' of the original memo of the same date issued by the (Annexure-'C) Ministry of Finance, by which the ETV was exempted from paying hourly charge of Taka 1200 or Taka 1800 thus depriving the Government exchequer of a huge amount of money every year.

11. The writ petitioners also claimed that though Mr AS Mahmud did not participate in the tender on behalf of ETV, yet the agreement was signed between the Government of Bangladesh and Mr AS Mahmud, in violation of Tender notice, Annexure-I(b) of the affidavit- in-opposition of the respondent Nos. 6 & 8 and clause 7 of tender conditions for establishing a private channel, Annexure-2 of the aforesaid affidavit-in-opposition. It would appear from Annexure-D dated 24 February, 1999 that a company under the name and style of Ekushey Television Ltd. had already come into existence by the time the agreement was signed. The petitioners further claimed that after signing the agreement with the Government Mr AS Mahmud transferred the licence to the Ekushey Television Ltd for Taka 200 crore. The petitioners further alleged that Mr AS Mahmud being a private individual and not a commercial enterprise and having not participated in the tender, cannot in law be granted licence to install and operate a private TV Channel. Therefore, the licence agreement signed with Mr AS Mahmud was malafide.

12. The petitioners claimed in the writ petition, that the licence agreement was signed in accordance with the provisions of section 4(1) of Telegraph Act, 1885 and section 5 of Wireless and Telegraphy Act, 1933. The petitioners alleged that since no licence was obtained from Ministry of Post and Telecommunications and no apparatus was imported by ETV Ltd after obtaining licence and clearance from that Ministry, the licence is illegal. The petitioners further claimed that under the co-site agreement signed between BTV and ETV Ltd., the ETV was given permission to use the towers and premises of BTV and its facilities, for a nominal rent. Lastly, by allowing ETV to set up its office inside the BTV complex at Rampura, the security of BTV, which is a key point installation, is exposed to threat. Thus the respondents who are under a legal and constitutional obligation to protect national interest, have acted in breach of law and the policy formulated by the government and against the national interest.

13. Respondent Nos. 6 and 8 in the Writ petition, Ekushey Television and its Managing Director, Mr Farhad Mahmud respectively, appeared by filing affidavit-in-opposition jointly. The main contention of respondent Nos. 6 and 8 in the writ was that the petitioners in the writ petition had no locus standi to file the case, the writ petition suffered from laches and delay, the evaluation report, (Annexure-"A-1"), by which ETV was shown to be a disqualified participant in the tender, was a manufactured report, the signatures on Annexure-"A-1" are superimposed, the allegation of changing report is not correct, the then Chief Engineer and Convener of the Evaluation Committee, by his letter dated 14-10-1988, informed that several evaluation reports were prepared and the

report which was attested by the Secretary on 14-10-1988 was the final evaluation report, ETV was duly qualified, Licensing Agreement with Mr AS Mahmud was a lawful one as ETV was neither a natural or a legal person, the subsequent transfer of licence to ETV was proper and lawful, the Ministry of Information has the authority in law, to sign the Licensing Agreement, ETV does not require a separate licence, the Licensing Agreement itself is a licence, the Prime Minister has the authority, under Rule 33 of the Rules of Business, to authorise the Ministry of Information to sign the Licensing Agreement under section 4 of Telegraph Act, 1985 and section 5 of the Wireless Telegraphy Act, 1993, ETV has not been using any of the BTV establishment including the 2nd VHF Channel unlawfully, the Finance Minister has rightly exempted ETV from the payment of Taka 1,200 per hour, while BTV is transmitting its programme at Taka 1,800 per hour, while BTV is not transmitting its programme and ETV has the approval from the Key Point Installation Defence Committee, to use BTV premises.

14. The respondent No. 7 in the Writ petition, Mr AS Mahmud, the Chairman and CEO of Ekushey Television by filing affidavit-in-opposition contested by supporting the statement of respondent Nos. 6 and 8. He claimed that he decided to participate in the tender through his proprietorship concern Ekushey Television. The respondent No. 7 claims that he has sufficient credentials to his credit. He is the Founder Director and subsequently publisher and the Managing Director of the Daily Star, one of the country's most successful English-language newspapers, the Founder and subsequent Chairman of Reliance Insurance Company Limited, a Director of the Infrastructure Development Company Limited founded by the World Bank and the Government of Bangladesh, the Chairman of Unidev Production Limited, a company involved in television production business and former President of Dhaka Chamber of Commerce for four years, etc. Since the tender notice clearly allowed participation in the tender by individual or on joint venture, local and foreign, he participated vide letter dated 24-5-1998. Then again, he participated in the tender as the proprietor of the Ekushey Television. He was the only applicant whose proposal was backed by technical collaboration proposal from BBC Worldwide Limited. He further claims that the Technical Evaluation Committee put Ekushey Television at the top of the list after evaluation of the proposals.

15. The Ministry of Information, respondent No. 1 in the writ petition, did not file any affidavit nor did it contest the Rule.

16. Respondent Nos. 2, 3 and 5 also filed affidavit-in-opposition while hearing of the writ was progressing. Respondent No. 2 is Bangladesh, represented by the Secretary, Ministry of Finance. It is stated in his affidavit-in-opposition that decision of charging Taka 1200 and formulation of some other conditions were taken in an inter-ministerial meeting with Ministry of Information and Bangladesh TV, the condition to charge Taka 1200 was dropped by the then Finance Minister on a representation by Mr AS Mahmud to the Finance Minister. Respondent No. 3 is Bangladesh, represented by the Secretary, Ministry of Post and Telecommunications. In his affidavit-in-opposition it is stated that the Ministry of Post and Telecommunications did not give any permission to ETV Ltd to import wireless telegraph apparatus by the letter dated 29-11-1999. This letter, as referred to at para 30 of the writ petition, was issued by the Frequency and Wireless Board. It is further stated that in the Import Policy Order 1997-2002, schedule 1 HS heading No. 85.85 it is provided that wireless telegraph apparatus can be imported in the non-government sector, on the basis of no objection certificate of the Ministry of Post and Telecommunications, but neither respondent No. 6, Ekushey TV Ltd. nor respondent No. 7, Mr AS Mahmud, applied to this Ministry for a no objection certificate. It is also stated that the ETV Ltd. has not been granted any licence in accordance with the provisions of Wireless and Telegraphy Act, 1933, as it did not apply for the licence.

Lastly, it is mentioned that this Ministry, vide its letter dated 6-9-2001 asked ETV about the licence, but the ETV replied that it did not require any such licence.

17. Respondent No. 5, Director General BTV, in his, affidavit-in-opposition, has stated that a co-site agreement between BTV and ETV was signed as set forth in the main contract. On the basis of this contract ETV is allowed to use the tower and its adjacent land of Dhaka, Natore, Khulna and Rangpur TV Stations. It is further stated that use of Sylhet Station by ETV was not included in the co-site agreement. ETV is co-sharing Sylhet Station on the basis of an instruction from the Ministry of Information. He has further stated that the space of tower or BTV used by ETV costs not less than Taka 15 crore. It is further stated that though a co-site agreement has been signed between BTV and ETV, but rent has been calculated based on the Public Works Departments rate and PWD cannot determine the cost involved to maintain key point installation. It is further stated that though a co-site agreement was supposed to be vetted by the Ministry of Law but due to various reasons BTV was not given time to send this agreement to the Ministry of Law. The fees mentioned in the co-site agreement was very nominal and was a great loss to BTV. It is further stated that terrestrial transmission can be viewed all over Bangladesh and a satellite transmission can be viewed by about 20% population of the country. It is further stated that the respondent No. 5 is not aware whether ETV has taken any clearance from the competent authority for using KPI premises like BTV station. But it mentioned that BTV, being a key point installation, has the highest possible security, which a private organisation cannot have at any cost under the contract. BTV has to allow ETV to use its tower as set forth in the contract and other infrastructure facilities like in building space, etc. which is causing losses to BTV.

18. On an inquiry by the court, respondent No. 5, the Ministry of Information, through Assistant Secretary respondent vide Memo No. 7g/P-3/13(3)/2001/06 dated 13-2-2002, informed the court that the enclosures in the file sent to the Prime Minister, along with the summary, were photocopies Annexure-II of civil petition for leave to appeal No. 636 of 2002. The details of the memo are as follows:

1. Photocopies were sent to the then Prime Minister's Office along with the summary.

2. Original evaluation report along with related papers are not available in the concerned file of the Ministry, because the evaluation report and concerned papers were kept by the then Secretary Mr Akmal Hossain under his personal custody which is not available now.

3. There is nothing of reference of those documents, including the evaluation report, in the file of the Ministry. It appears and is also evident from the UO Note dated 14-10-1998 sent by the then Secretary Mr Akmal Hossain to DG, BTV, that the evaluation report was physically handed over by Mr Anisur Rahman, the then acting Chief Engineer, BTV, to Mr Akmal Hossain, the then Information Secretary. There is no evidence in the Ministry's file and also in the letter entry register, that the original evaluation report was sent by the Secretary to the concerned Branch/Section of the Ministry. As such, the original evaluation report is not available in the relevant file of the Ministry.

4. It is true that the UO notes sent by the then Secretary Mr Akmal Hossain to DG, BTV, on 14-10-1998 and 15-10-1998 are not available in the Ministry. The UO notes were not sent down to the concerned section. These were sent from the then Secretary's office directly and the original office copies of those two

UO notes have been found in a folder left by the then Secretary.

5. Although the letter of the then DG, BTV dated 15-10-1998, in reply to the then Information Secretary's UO note, was received by the Secretary's Office, there is no evidence in the movement register that the letter has been sent down to the concerned Branch/Section for keeping in the files.

6. The clarification letter sent by Mr Anisur Rahman, Acting Chief Engineer of BTV, on 14-10-1998 was sent with an enclosure of the letter sent by Mr Salauddin Zaki, the then DG, BTV, which was received by Secretary's Office. But subsequently it was not sent down to the concerned Branch/Section.

7. The concerned papers were kept by the then Information Secretary and these were not sent to the concerned section. As such, there is no record of this in the Ministry's Note Sheet of the concerned file.

19. Upon hearing the parties, the High Court Division made the Rule absolute on the finding that the Evaluation Report was changed, by which the disqualified participant, ETV, was made qualified, which is a malafide exercise of power by the respondents. The whole process of preparing report was not transparent and since the changing of evaluation report was malafide all subsequent actions, taken on the basis of the changed report, are also malafide. However, the High Court Division have found that signing of Licensing Agreement itself or its subsequent transfer to ETV Ltd was not unlawful. The High Court Division has further found that in signing the Licensing Agreement with Mr AS Mahmud, the Government has not violated any provisions of Telegraph Act, 1885, Wireless Telegraphy Act, 1933, Article 145 of the Constitution and in that view of the matter the signing of the Licensing Agreement may be considered irregular, but it is not invalid or void. It also held that the Finance Minister was competent to exempt ETV from the payment of Taka 1200 per hour while BTV is transmitting its programme. It did not find anything wrong with the permission given by the Key Point Installation Defence Committee to ETV, to use BTV premises. But at the same time it observed that though ETV obtained certificate of registration, but the certificate itself is not sufficient to set up telecasting installation. The proposal of ETV must be legally accepted by the concerned Ministry at the very initial stage.

20. Since the original evaluation report was not sent with the file the court in order to come to a proper decision directed Mr Akmal Hossain, former Secretary, Ministry of Information to produce the evaluation report and other related papers written by Mr Nazmul Alam, Director General, Bangladesh Television. Mr Akmal Hossain, the Information Secretary, in his sworn statement dated 4 March, 2002, denied giving any instruction to the Director General, to change evaluation report and include ETV in the list of qualified participants (Annexure-V) to the leave petition No. 636 of 2002.

21. Mr Rafique-ul Huq, the learned Counsel appearing for the petitioners, Ekushey Television and its Managing Director, Mr Farhad Mahmud, challenges the maintainability of the writ petition as the writ petitioners are not directly affected. The High Court Division ignoring the guidelines determined by the Appellate Division as to locus standi to maintain a public interest litigation acted illegally in holding that public litigation may even be directed against less fortunate persons when the question of malafide exercise of power or the question of transparency is agitated and thereby extended the scope of public interest litigation.

22. The High Court Division acted illegally in making the Rule absolute on the ground of transparency and malafide though the Rule was issued in different terms.

- 23.** The High Court Division committed illegality in holding that the selection process in which, ETV and seven other participants were selected lacked transparency and accountability and, as such, the whole selection process was malafide, in spite of the fact that the Government took various measures to ensure transparency and accountability in the selection process, as is evident from the UO Note dated 14-10-1998, issued by the Secretary, Ministry of Information, and the letter dated 15-10-1998 of Mr Anisur Rahman, the Chairman of Technical Evaluation Committee.
- 24.** The High Court Division did not find ETV in any manner responsible for such lack of transparency and accountability nor ETV contributed in such lacking of transparency and accountability and yet made the Rule absolute, thereby depriving ETV of a licence granted by the Government, after complying with all necessary formalities and thereby committed serious illegality in the name of public interest litigation.
- 25.** The High Court Division erred in law in not holding that the writ petition was not maintainable on the ground of delay and gross laches.
- 26.** The High Court Division did not consider the implications of various provisions of the Board of Investment Act, 1980 and Foreign Private Investment (Promotion and Protection) Act, 1980 before passing such a drastic and far reaching judgment.
- 27.** Mr Syed Ishtiaq Ahmed, the learned Counsel appearing for the petitioners, Mr AS Mahmud, Chairman and Chief Executive Officer of Ekushey Television, in Civil Petition for Leave to Appeal No. 617 of 2002 submits, that the High Court Division committed serious error of law in finding the writ petitioner has locus standi to file the present writ petition as a public interest litigation, in making the Rule absolute on the ground of malafide vitiating the entire process of granting of the licence, whereas the Rule has been issued only upon the specific points, asking the respondents to show cause as to why the Licensing Agreement signed by and between the Ministry of Information and Mr AS Mahmud and the subsequent approval to transfer the said licence to ETV Ltd, should not be declared to have been entered into and granted unlawfully and without lawful authority.
- 28.** The High Court Division committed illegality in purporting to avoid a concluded contract in the writ jurisdiction on the ground of malafide without reference to the laws of contract and the relevant provisions of the Contract Act, 1872. In any view of the matter malafide or even fraud on the part of the Government as one of the contracting parties does not make a concluded contract void under the Contract Act.
- 29.** He has further argued that the High Court Division should not have taken on its shoulder the burden to find malafide. It lies on the party who alleges it.
- 30.** The High Court Division committed a serious error of law in adjudicating upon seriously disputed questions of fact in the writ jurisdiction.
- 31.** Dr Kamal Hossain, the learned Counsel appearing for the intervener petitioners Citicorp International Finance Corporation and Waterford Partners LLC in Civil Petition for Leave to Appeal No. 510 of 2002, has argued that the High Court Division failed to appreciate that the effect of the Judgment holding that the licence granted to ETV Limited was done without lawful authority, is to expropriate the substantial equity investment of the petitioners, without their having had any opportunity to present their position and in disregard of the protection afforded to them as foreign investors by the Foreign Investment (Protection and Promotion) Act, 1980 and the Bilateral Investment Treaty between Bangladesh and USA.

32. The High Court Division failed to appreciate that on the basis of license issued by the Government the respondent No. 8 has been operating for more than two years and rights of bona fide third parties were created and were subsisting including those of the petitioners as foreign investors, in addition to those of international lenders, the large number of employees and the growing audience of respondent No. 8 and the judgment in effect destroys those rights.

33. Mr Hassan Ariff, the learned Attorney-General appearing for the petitioner, Director General of Bangladesh Television in Civil Petition for Leave to Appeal No. 636 of 2002, has argued that the High Court Division committed illegality in observing that the Government, Bangladesh Television failed to produce the file, inasmuch as the records before the court do not warrant such observation and which has no nexus with the materials on record.

34. He has further argued that the High Court Division erroneously observed that the relevant files were not produced and/or withheld inasmuch as the called for files were duly produced but the High Court Division could not find therein certain recording of minutes/deliberation, the absence of which have been sufficiently explained by materials on record.

35. Mr Abdur Razzaq, the learned Counsel appearing in Civil Petition for Leave to Appeal No. 516 of 2002 for its petitioners who are also the writ petitioners submits that the High Court Division has failed in its constitutional obligation to correctly interpret the provisions of Article 145 of the Constitution and consequently failed to come to the conclusion that the Ministry of Information has signed the Licensing Agreement with the respondent No. 7 in violation of provisions of Article 145 of the Constitution and the Rules of Business.

36. He has argued that the High Court Division has failed to correctly evaluate the provisions of Article 55(6) of the Constitution vis-a-vis the Rules of Business and consequently failed to hold that the Prime Minister has no authority under Rule 33 of the Rules of Business to act contrary to, or vary the specific statutory provisions as contained in section 4 of the Telegraph Act 1985 and section 5 of Wireless Telegraphy Act 1933.

37. The High Court Division should have held that Ekushey Television Ltd was required to hold a statutory licence from the Government of Bangladesh under section 4 of the Telegraph Act, 1885 and statutory licence from the Director General, Bangladesh Post Office under section 5 of the Wireless Telegraphy Act, 1933.

38. He has further argued that the High Court Division ought to have found that the respondent No. 7 having not participated in the tender and Ekushey Television Ltd having been incorporated as a limited company on 1st July, 1998, the Licensing Agreement dated 9th March, 1999 signed by the Ministry of Information with the respondent No. 7 and the subsequent approval dated 5 April, 1999 to transfer the licence to Ekushey Television Ltd was malafide and without jurisdiction and therefore void.

39. He has further argued that the High Court Division has erred in law in not coming to the conclusion that the ETV Ltd has been unlawfully using various establishments including the second VHF channel of Bangladesh Television generally and other facilities in violation of the specific provisions of the co-site Agreement, exempting ETV Ltd from the payment to BTV giving undue and unlawful financial benefit granted to ETV Ltd at the cost of public exchequer and also that BTV, being a key point installation, the use of

BTV premises by ETV without prior permission from Key Point Installation Defence Committee, was unlawful and detrimental to the security of the State.

40. The initial argument put forward by Mr Rafique-ul Huq and Mr Syed Ishtiaq Ahmed, the learned Counsels, when the petition reached for hearing before us is that the writ petition is not maintainable as the petitioners have no locus standi.

41. Traditional interpretation given to locus standi is that judicial redress under Article 102 is available only to a person who has suffered a legal injury by reason of violation of his legal right by the impugned action of the State or a public authority.

42. The legal community has played a critical role in expanding locus standi to those who were previously deprived of it because of strict interpretation of the term "aggrieved person" used in Article 102 of the Constitution.

43. In Dr Mohiuddin Faroque's case (49 DLR (AD) 1) it is stated in para-8".....if there is a public cause involving public wrong or public injury, any member of public or an organisation whether being a sufferer himself/herself or not may become a person aggrieved if it is for realisation of any of the objectives and purposes of the Constitution."

44. On the question of locus standi the case of Kazi Mukhlesur Rahman (26 DLR (AD) 44) has laid down the following propositions:

(1) The High Court Division does not suffer from any lack of jurisdiction under Article 102 to hear a person.

(2) If a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him alone. It is enough if he shares that right in common with others.

(3) In interpreting the words "any person aggrieved", consideration of "Fundamental Rights" in Part III of the Constitution is a relevant one.

(4) It is a question of exercise of discretion by the High Court Division as to whether it will treat that person aggrieved or not.

(5) The High Court Division will exercise that jurisdiction upon due consideration of the facts and circumstances of each case.

45. In Mohiuddin Faroque's case while the judges giving separate judgments Chief Justice Mr ATM Afzal says that a person having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or relation of some provision of the Constitution.

46. Mr Justice Latifur Rahman has expressed that a person in approaching the court for redress of a public wrong or public injury has sufficient interest in the proceedings if he acts bonafide.

47. What is meant by sufficient interest is basically a question of fact and law which shall have to be decided by the court. None of the fundamental rights like rule of law is subject to mechanical measurement. They are measured in our human institution i.e. the courts and by human beings i.e. the judges, by applying law. Therefore, there will always be an element of discretion to be used by the court in giving standing to the

petitioner. From the above, it appears that the courts of this jurisdiction has shifted its position to a great extent from the traditional rule of standing which confines access to the judicial process only to those to whom legal injuries caused or legal wrong is done. The narrow confines within which the rule of standing was imprisoned for long years have been broken and new dimension is being given to the doctrine of locus standi.

48. According, the averments made in this particular writ petition specific legal wrong was done in performance of public duty which is vitiated by non-transparency and malafide. It is alleged that the respondents by their acts have abused power and a public wrong is committed by total disregard of law which may not have caused any specific legal injury to an individual or group of individuals but caused injury to the people in general. The petitioners claim that being conscious members of the society they have sufficient interest to challenge the constitutionality of the public wrong committed by the respondents.

49. It is claimed that the public duty, the petitioners sought to enforce, is one which the authority owes to the general public and not to specific individual or class or group of individuals. The petitioners being citizens of Bangladesh are entitled to maintain an action because they have sufficient interest. Barring them will create a situation in which Constitutional rights of general people will be denied.

50. The preamble of our Constitution undertakes to secure to every citizen justice. The preamble along with other articles and provisions of the Constitution have given justice an ampler dimension to provide justice to every citizen of the country. Above all, the Constitution reposes all the power to the people. Article 7 makes it clear that all legislative, judicial and executive powers are conferred on the people through the Constitution.

51. With the prefatory assessment of the locus standi and discussion on the preliminary objections raised by the learned Counsels for the respondents we may now turn to the facts of the writ petition to consider whether there was any violation of public duty as alleged.

52. There are some essentials in the legal realm that are of monumental importance. One of them is the duty of the court to protect the ordinary citizen from the executive excess and corrupt practice. The Court is always under tremendous pressure to locate and address the question of executive accountability since a citizen has a right to clean administration. Expectation for a clean administration is further generated by bureaucratic norms and pressures which requires maintenance of transparency in carrying out their public duties. The High Court Division while delivering its judgment has gone into detail to examine particularly this aspect of the case and found lack of transparency and accountability in the process of evaluation report of the participants in the tender for opening a private TV Channel and the licence given thereunder. It came to a finding that the procedure lacked transparency and was malafide.

53. The allegation is that the evaluation report of the technical committee was changed. The High Court Division found that there are two evaluation reports Annexure-A(1) and Annexure-B(1). These two evaluation reports of the technical committee, bear the same number, the same date and are also signed by all the four members of the technical committee. The evaluation report which is annexed as Annexure-A(1) was forwarded to the Secretary Ministry of Information by a letter which is annexed as Annexure-A. Similarly, the evaluation report annexed as Annexure-B(1) is forwarded to the Secretary Ministry of Information by a letter annexed as Annexure-B. In the third paragraph of

Annexure-A(1) Ekushey Television is placed in the fifth position and found to be not responsive along with ten other participants. But in the Annexure-B(1) the position of the participants were changed to such an extent that non-responsive Ekushey Television was placed at the top of the responsive participants whereas Multimedia Production Company Ltd which topped the list of the responsive participants in Annexure-A(1) was placed at the bottom of the list of Annexure-B(1).

54. Further to this, an important change can be noted in the third paragraph of Annexure B1. A sentence is added by which the proposals of some of the participants mentioned therein, including Ekushey Television, are to be considered subject to some conditions. This sentence is quite poignantly absent in Annexure A1.

55. The report does not mention what were the conditions and who set or decided those conditions nor any explanation for changing the position of ETV from a non responsive participant to a responsive participant. "It is strange to note that it is not mentioned that on the basis of the evaluation of proposals of all the participants, the proposals of those eight participants were found responsive rather it is mentioned that if certain conditions are fulfilled, only then their proposals may be considered," observed the High Court Division. It further observed that nowhere those conditions were mentioned. Under the circumstances the High Court Division called for the file of the technical committee in which the minutes or deliberations were recorded to be examined by it. The High Court Division passed two orders for the production of the file before the court but according to it (at page 140 of the leave petition No. 504 of 02) the relevant file was not produced and no explanation was given as to what happened to the file. The conditions which were required to be fulfilled for consideration of the proposals of those eight participants still remain unknown.

56. Instead a file of BTV bearing No. TV (project) 005,07 was produced before the High Court Division from which it may be found that a meeting was held on 2-7-1998 in which the committee was directed to submit a report by 6-7-1998. From the same file it may be found that the Chairman of the committee called a meeting of the committee on 6-7-1998 and notice was also served upon the members but on a search of the file no minutes or deliberations of the meeting were found to have been recorded therein. It gives rise to doubt whether all the files were produced before the High Court Division. Official records and papers are in the public domain and part of the public record and they should be made available if asked for by the court. The petitioner in the leave petition No. 636/2002, the Director General BTV claims that the file called for and the file available to them was produced before the court. But the file does not have any noting of the minutes or the deliberations that took place in the meeting held on 6-7-98. The reasons may be that the relevant file was suppressed or there is no file on which such noting was made. In either case the process of preparing the evaluation report of the participants in the tender for opening a private TV channel is not transparent.

57. It also leads us to conclude, in agreement with the High Court Division, that the evaluation report, Annexure 'B' is not a 'complete report'. It does not state what conditions had to be fulfilled by the Ekushey Television to become responsive and placed at the top of the list. The conditions were not even disclosed to the participants. No reason is given for changing the evaluation report or why there are more than one report with the same memo number and the same date. The selection process of ETV reveals arbitrary action and abuse of power and the evaluation report of the technical committee malafide.

58. Law requires that subsequent change of terms and conditions of tender must be relayed to each and every participants so that all the participants can avail of the equal opportunity while participating in the tender. But in this case subsequent change of conditions were kept secret to other participants. As a result of which requirement of law are not met with and other participants were discriminated and deprived of participation in the tender on equal terms.

59. The High Court Division found neither of the evaluation reports, Annexure-A(1) and Annexure-B(1), forged. It was initially argued by the respondents that Annexure-A(1) was forged and the signatures were superimposed. But this line of argument was not pressed as it was found from Annexure-5(b) of the affidavit-in-opposition filed by respondent Nos. 6 and 8 that the convener of the technical committee never claimed the evaluation report (পরিশিষ্ট-২) to be a forged one.

60. It also appears that the evaluation report annexed as Annexure-B(1) and the report annexed at pages 178-179 of the affidavit-in-opposition of the respondent Nos. 6 and 8 under Annexure-5(b) is a copy of the same report. The difference between the two is that Annexure-B(1) is not attested by the Information Secretary whereas report enclosed with Annexure-5(b) is attested by the Information Secretary on 14-10-1998. From the aforesaid Annexure, it may be noted that both the evaluation reports are dated 9-7-1998 but the then Information Secretary waited three months to attest one of them. A summary to the Prime Minister was submitted for approval which was subsequently obtained. Mr Rafique-ul Huq, the learned Counsel, claims that between the two reports only 5(b) was forwarded to the Secretary, Ministry of Information. But his contention is not backed by evidence since in the file of the BTV a photocopy of a letter, Annexure-A, forwarding Annexure-A1 is found. From this it can be concluded that the evaluation report Annexure-A(1) was given to the Secretary, Ministry of Information, by hand as evident from the peon book of BTV and UO Note of the Secretary, Ministry of Information, at page 412 of the leave petition, Annexure 5. It is true the court cannot go into the merit of the decision taken by the technical committee, but it can always review the manner and procedure followed by it. On review of the process adopted in giving licence to Ekushey Television we come to the conclusion that there exists more than one evaluation report bearing the same number and date and one of them is changed to the advantage of ETV. We also come to the conclusion that the process in giving licence to Ekushey TV is definitely not transparent.

61. At this stage it seems appropriate to discuss the role of the then Secretary, Ministry of Information. In this connection Annexure-5 of the affidavit-in-opposition of the respondent Nos. 6 and 8 of the writ petition (at page 412 of the leave petition) which is an unofficial letter dated 14-10-1998 written by Mr Akmal Hossain, Secretary, Ministry of Information can be referred to. In it he has expressed his ignorance about the existence of two evaluation reports. He claimed that on receipt of a copy of the evaluation report (পরিশিষ্ট-২) from a journalist and on coming to know about the existence of two evaluation reports he enquired of the Director General, BTV which one was the final report. Subsequently, he was told that the final report was the one attested by him.

62. In a letter dated 16-2-2002 signed also by the Civil Engineer and the Chief Engineer of BTV, it is stated that the convener called all of them and asked to change the recommendation as it was the desire of the higher authority. The recommendation was changed accordingly and signed by all the members.

63. By a sworn affidavit dated 4 March, 2002 Mr Anisur Rahman, convener of the

Technical Evaluation Committee, replied to the court's direction by stating that immediately after the submission of the evaluation report with recommendation to the Secretary, Ministry of Information, the latter called him and explained that the report should be changed to qualify ETV as per desire of the higher authority and accordingly, another recommendation was written keeping the detailed evaluation intact but qualifying ETV. All the committee members signed the second recommendation, keeping date, reference, etc of the latter report same as those of the first report in which ETV was found not to be qualified and which was also submitted to the Secretary. All this reflects on the integrity of Mr Akmal Hossain, the then Secretary, Ministry of Information, with the evaluation report. Everything that had happened in respect of the evaluation report was in the knowledge of the Information Secretary. Even then, he had to take recourse to a cooked up story that he came to know about the existence of the two reports for the first from a journalist (Annexure-5). His denial of the knowledge of existence of two reports and claim that Mr Mustafizur Rahman's statement has no relevance to the original evolutionary report is really unbelievable.

64 The role of Mr AS Mahmud, the respondent No. 7 and the Chairman of ETV, is no less dubious than that of the Secretary, Ministry of Information. As the ETV affair unfolded his role became progressively dubious. He, in his capacity as the Chairman of Ekushey Television, applied for withdrawal of per hour payment to BTV(Annexure 7(a) of the affidavit-in-opposition of respondent Nos. 6 & 8) and obtained the concession from the Ministry of Finance and then entered into an agreement in his individual capacity, and not on behalf of ETV, for establishing a private TV channel with the Government of Bangladesh, represented by the Joint Secretary, Ministry of Information (Annexure 8 of the affidavit-in-opposition of the respondent Nos. 6 & 8).

65. From the record it may be seen that Mr AS Mahmud did not participate in the tender in his own individual capacity. The tender notice dated 6-5-1998 also did not invite any individual to participate, it only invited financial and technical proposals from local and foreign firms individually or under joint venture and not from an individual. But what actually took place was contrary to the intention of the tender notice. After participating in the tender on behalf of ETV Mr AS Mahmud signed the licensee agreement in his individual capacity with the Government of Bangladesh.

66. The record also shows that Mr AS Mahmud, the respondent No. 7 in the writ petition, applied in his individual capacity, for license to operate a private TV channel on 25 June, 1998 (Annexure 3 to the affidavit-in-opposition of the respondent Nos. 6 & 8) when Ekushey Television was already in existence. It had already obtained a licence from the Dhaka City Corporation for carrying out its business on 21-6-1998. Annexure, 3(b) is VAT Registration Certificate given by Customs, Excise and VAT Authority to Ekushey Television. Annexure-3(c) is a certificate from the Deputy Commissioner of Taxes showing that ETV is a tax payer. Annexure-6 dated 22-11-1998 of the affidavit-in-opposition of respondent Nos. 6 & 8 is a letter from Deputy Secretary, Ministry of Information to Mr AS Mahmud, of Ekushey Television, informing him that the Government has taken a preliminary decision, on principle, to allow ETV to establish a private TV channel. Annexure-7 dated 22-2-1999 of the affidavit-in-opposition of respondent Nos. 6 & 8 is another letter written to Ekushey Television by Senior Deputy Secretary, Ministry of Information regarding the licence fee. Annexure 7(a) dated 24-2-99 is a letter written by AS Mahmud on the pad of Ekushey Television to Mr Shah SM Kibria, the then Finance Minister to withdraw payment of hourly charge to the Government for use of BTV tower and facilities. All these show that ETV was already in existence when the licence agreement was signed on 9-3-1999 between Ministry of Information and Mr AS Mahmud in his individual capacity. It will be further obvious

from the fact that on 18 March, 1999, nine days after the signing of the licence agreement Mr AS Mahmud, the respondent No. 7 using the letter head of ETV and representing himself as its Chairman, made an application to the Ministry of Information for obtaining permission to transfer the said licence for ETV (Annexure 10 of the affidavit-in-opposition of respondent Nos. 6 & 8). The permission was granted by the Ministry of Information by a letter dated 5th April, 1999 (Annexure 10(a) of the affidavit-in-opposition of the respondent Nos. 6 & 8). It is not understood why the agreement was not signed with ETV but was signed with Mr AS Mahmud, in his individual capacity, when ETV was there, when its organum was there and when Mr Simon Dring of BBC was there.

67. Annexure-10(a) of the affidavit-in-opposition of the respondent Nos. 6 & 8 further reveals, that while giving permission to transfer the licence to ETV, Mr AS Mahmud was asked to send all the papers and information to the Ministry. It only leads to the conclusion that the licence was given by the Ministry without consulting the relevant papers, which means the question of giving licence to ETV was already decided.

68. It is surprising to note that a vendor's agreement between AS Mahmud and Ekushey Television was entered into on 3 March, 1999, (Annexure-11 of the affidavit-in-opposition of the respondent Nos. 6 & 8) prior to the Government permission to transfer the licence to ETV. Under this agreement signed on 5-4-1999 the vendor, AS Mahmud, agreed to transfer and ETV agreed to purchase the licence issued to Mr AS Mahmud under clause 11(3) of the Agreement.

69. The above leads us to conclude that the Ekushey Television is an example of wanton licence with a shady deal in every step of the licensing process. It illustrates how executive power can be corrupted while law is forced to take a back seat. It essentially appears that the concerned bureaucrats washed off their hands from public duty on pressure from above, without any regard to law. What strikes the thinking minds is that this gives administrative corruption an all permissive dimension. If abuse of power in the ETV affairs is not allowed to be challenged before this court, it will undermine the constitutional provisions that establish the relevance of executive adherence to rule of law. What happened in this case must open the eyes of both the Government as well as the people at large to the uncontrolled exercise of executive power. Providing immunity will be against the rule of law that requires accountability and transparency in running the Government.

70. The duty which is breached, causing injury, is owed by the state, as a public authority, not to any specific or determinate class or group of people or to a particular individual, but to the general public. Such cases of public injury cannot necessarily be shown to affect the rights of a determinate class or a group of people. No one can possibly be shown to be in a position to claim that a specific legal injury is caused to him alone. If breach of public duty of this kind and proportion, is allowed to go without any redress the failure to perform such public duty would go unchecked and would open the door for corruption. There would be no check on the house of power. It will also result in a denial of constitutional rights of the general public.

71. This court under constitutional mandate is duty bound to preserve and protect the rule of law. The cutting edge of law is remedial and the art of justice has to respond here so that transparency wins over opaqueness. In the instant case the petitioners, though not personally affected in espousing a genuine cause, but have drawn the court's attention to the breach of constitutional obligations.

72. Such gross violation of fundamental rights should shock the judicial conscience and force it to leave aside additional procedure which shackles the locus standi and gives standing to the petitioners. Unless this court responds to it, governmental agencies would be left free to subvert the rule of law to the detriment of the public interest. We must therefore, reject the preliminary objection raised, challenging the locus standi of the petitioners in the writ petition, since important issues relating to public wrong and rule of law are involved. It being a litigation affecting public wrong, the petitioners have interest and locus standi to file the petition.

73. It must be remembered here, that it is not possible to lay down in clear and precise terms what is required to give petitioner locus standi when public injury or public wrong is involved. Locus standi is not a case of jurisdiction of the court, but a case of discretion of the court, which discretion has to be exercised on consideration of facts and law points involved in each case, as already pointed out in the case of Kazi Mukhlesur Rahman. As a matter of prudence and not a rule of law, the court may confine its exercise of discretion, taking into consideration the facts, the nature of the public wrong or public injury, the extent of its seriousness and the relief claimed. Therefore, the concern shown by the Bar, that giving locus standi to the petitioner will open the floodgates, and the court will soon be overburdened by cases, does not hold good. The discretion to open the gates will always be with the court, which discretion will only be exercised within the bounds mentioned above.

74. The respondents also argue that the petitioners were indolent and approached the court for redress of their grievance, after a long lapse of time and therefore, the petition should have been rejected. The rule in respect of the court's power to inquire into delayed and old claim is not a rule of law, but a practice and depends much on proper exercise of discretion. Each case must depend on its fact such as how the breach of fundamental right occurred, the nature of the injury and lastly how the delay is caused. The test in such case is not physical running of time but whether a parallel right has accrued and whether the lapse of time can be attributable to laches and negligence.

75. But, above all, while the circumstance justifying the conduct exists, the illegality which is manifest, cannot be sustained on the sole ground of laches. In this particular case ETV was granted license on 9-3-1999 and it started broadcast on 8-3-2000. Three reports on how ETV licence was obtained appeared in the Weekly Magazine Jaijai Din on 1-9-1998, 22-1-1998 and 11-9-2001. The last and third one was the cover story and it appeared after ETV started broadcasting. Therefore, the petitioners claim that there was no delay in approaching the court. The High Court Division has accepted the explanation and we do not find any reason not to accept it.

76. The learned Counsels for the respondents have argued that once a contract is concluded, it can be challenged only if there is breach of terms and conditions and then again, not under Article 102 of the Constitution. This line of argument is not acceptable to us, as the writ petition before the High Court Division was not regarding breach of terms and conditions of a contract. In this particular case the High Court Division looked into the procedure adopted in giving licence to ETV and on doing so, it has exercised its jurisdiction under Article 102 which on the facts of the case, in our view, is quite justifiable.

77. The respondents took objection to the High Court Division's direction, to the Ministry, to produce the relevant file on the evaluation report and questioned why the court should take on its shoulder the onus to find malafide. According to them, burden should be on the shoulder of the petitioners, as they were the ones who alleged

malafide. The answer to this is that, if the learned Judges of the High Court Division thought it appropriate that an investigation should be made in a writ petition, they were not barred from directing parties to lead evidence. Such an investigation only assists the court in the realisation of the constitutional objectives. Such directions and orders passed by the court are incidental or ancillary to its jurisdiction of enforcement of fundamental rights. Power has been vested in the High Court Division to issue writ or order to any party within its jurisdiction, under Article 102 of the Constitution. But this power should be exercised cautiously and prudently.

78. Dr Kamal Hossain, the learned Counsel, argues that the foreign companies have invested heavily on ETV and a third party right has already accrued. Now, if the terrestrial channel of ETV is closed down for no fault of the foreign companies, they will suffer heavy loss which will have a far reaching adverse affect on foreign investment in the country.

79. Many in Bangladesh subscribe to the viewpoint that while doing something Bangladesh should always be concerned about the adverse impact it might have on foreign investors in this country. But law has its own way and is inclined to speak in its own language. When money talks judiciary must not balk. Syndicated bridge-financing for the Ekushey Television by some foreign and local banks and the investment by the USA finance company is neither a contribution to philanthropy nor an effort to do something for the noble cause of free media. It is a simple case of investment, and like every investment the investment in ETV has its own risk. The third party rights exist and fall with the Ekushey Television, since their interests are merged with that of ETV. The substantive legal principle in this regard is that every person is subject to the ordinary law within the jurisdiction. Therefore, all persons within the jurisdiction of Bangladesh are within Bangladesh rule of law. The foreign investors in ETV are no exception to this principle. The submission of Dr Kamal Hossain is, therefore, bereft of any substance.

80. In view of the above we are in complete agreement with the High Court Division that the changing of the evaluation report is malafide, the process of preparing the evaluation report is not transparent and subsequent actions taken on the basis of the changed report are malafide and the licence given to ETV is not, therefore, sustainable in law.

81. We also find non fulfilment of section 4 of the Telegraph Act, 1885 and section 5 of the Wireless Telegraphy Act, 1933. Therefore, we do not find any illegality committed in the judgment of the High Court Division calling for our interference.

All the leave petitioners are dismissed.

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